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BEFORE THE
SURFACE TRANSPORTATION BOARD

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CARGILL, INCORPORATED

Complainant,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42120

DEFENDANT'S MOTION TO COMPEL DISCOVERY

Defendant BNSF Railway Company ("BNSF") hereby requests pursuant to 49 C.F.R. §1114.31 that the Board issue an order compelling Complainant Cargill, Inc. ("Cargill") to respond to BNSF's First Set of Discovery Requests on issues relating to injury and damages.

INTRODUCTION

This case presents novel questions regarding what type of injury and damages, if any, a shipper may claim in challenging a fuel surcharge under an unreasonable practice theory instead of a rate reasonableness theory. Cargill has thus far avoided taking a position regarding the precise nature of its injury and damages except to suggest that it may advance some species of "overcharge" claim. While BNSF believes that any "overcharge" claim clearly runs afoul of *Union Pacific Railroad Company v. I.C.C.*, 867 F.2d 646 (D.C. Cir. 1989) ("*Union Pacific*"), BNSF cannot predict what evidence of injury and damages Cargill might present in an effort to avoid *Union Pacific* and fit its claims into the framework of an alternative unreasonable practice theory. Given this uncertainty, BNSF is entitled to conduct broad discovery regarding the precise injury Cargill claims to have suffered and the nature of any damages that Cargill seeks to recover to compensate for such injury.

BNSF's First Set of Discovery Requests, served on January 14, 2011, focus on whether the challenged fuel surcharge practice injured Cargill and, if so, the extent of any recoverable loss that Cargill incurred. Cargill objected to the requested discovery on grounds that BNSF seeks information irrelevant to the issues raised in this dispute. Specifically, Cargill refused to provide any answer at all to 12 of 21 interrogatories and refused to produce any documents in response to 15 of 19 document requests.

Having allowed Cargill to proceed on its unreasonable practice claim based on a theory of misrepresentation, the Board must now allow BNSF the discovery it needs to prepare to defend itself against Cargill's claims of injury and damages. It would be particularly inappropriate to curtail BNSF's right to discovery in this case where, in response to BNSF's motion to dismiss Cargill's damages claims, the Board expressly ruled that issues relating to Cargill's alleged injury and damages should be addressed in the evidence, not in preliminary rulings. Cargill cannot be allowed to preclude BNSF from developing that evidence by unilaterally asserting at the discovery stage what information would be relevant to BNSF's defenses. Broad discovery is now required so that the novel issues raised here can be addressed based on a fully developed record. See *Entergy Arkansas Inc. v. Union Pac. R.R. Co.*, No. 42104, at 5 (STB served May 19, 2008) ("*Entergy*"). As set forth in more detail below, the Board should require Cargill to answer BNSF's discovery requests.

BACKGROUND

Cargill's complaint alleges that the mileage-based fuel surcharge assessed by BNSF on movements of agricultural and other carload traffic is an unreasonable practice because (1) "the general formula . . . [used] to calculate fuel surcharges bears no reasonable nexus to, and overstates, the fuel consumption for the BNSF traffic to which the surcharge is applied," and (2)

“BNSF is using the Assailed Tariff Item to extract substantial profits over and above its incremental fuel cost increases.” Comp. ¶¶ 6 and 7.¹ Cargill’s complaint requests that the Board “prescribe reasonable fuel surcharge practices” and also seeks damages “for all unlawful fuel surcharge payments it has made.” Complaint at 4.

In a motion filed on May 28, 2010, BNSF moved to dismiss Cargill’s claims for relief in the form of damages on grounds that Cargill’s request for damages would inevitably focus on the level of the surcharge and would therefore “impermissibly regulate rate levels, contrary to *Union Pacific*.” BNSF Railway Company’s Motion For Partial Dismissal, at 11 (filed May 28, 2010), quoting *Dairyland Power Cooperative v. Union Pacific Railroad Co.*, STB Docket No. 42105, slip op. at 5 (served July 29, 2008) (“*Dairyland*”). Cargill opposed BNSF’s motion to dismiss Cargill’s damages claims, arguing that “it is, of course, far too early in the proceeding for the Board to start addressing the merits of damage calculations that Cargill has not yet presented to the Board. . . .” Cargill’s Reply In Opposition To BNSF Railway Company’s Motion For Partial Dismissal, at 19 note 12 (filed June 17, 2010).

In its January 4, 2011 Decision, the Board denied BNSF’s request for dismissal of Cargill’s damage claims, stating that “[a]t this early stage of the proceeding, before any finding of unlawful conduct and before any evidence has been presented, it would be premature for us to rule on this aspect of the motion to dismiss.” January 4, 2011 Decision at 6. However, the Board’s January 4, 2011 Decision did acknowledge that, consistent with its findings in

¹ Cargill also asserted that BNSF was improperly “double recovering” incremental fuel costs in both its base rate and the fuel surcharge, but the Board dismissed that claim. *Cargill, Inc. v. BNSF Railway Co.*, STB Docket No. 42120 (served Jan. 4, 2011) (“January 4, 2011 Decision”). Cargill subsequently moved for leave to replead its “double recovery” claim to add an allegation of misrepresentation. BNSF has opposed Cargill’s motion on grounds that the flaws in Cargill’s “double recovery” claim cannot be cured by dressing up that claim in the garb of misrepresentation. Cargill’s motion, filed January 24, 2011, is pending before the Board.

Dairyland and Rail Fuel Surcharges, STB Ex Part No. 661 (served Jan. 26, 2007), Cargill's challenge to BNSF's fuel surcharge as an unreasonable practice must be based on a misrepresentation theory. Cargill's claims in this case must therefore focus on the existence and effects of an alleged misrepresentation—not the reasonableness of the level of the fuel surcharge. As the Board explained in rejecting Cargill's "double recovery" claim, that "claim would necessarily focus on whether the level of the rate is justified, contrary to *Union Pacific*." January 4, 2011 Decision at 6. The Board also established a procedural schedule which included an accelerated period for discovery ending on April 4, 2011.

On January 14, 2011, BNSF served its First Set of Discovery Requests, included as Attachment A. BNSF's discovery requests included 21 interrogatories and 19 document requests. The focal points of BNSF's discovery requests were Cargill's claim that it was injured by BNSF's allegedly unreasonable fuel surcharge practice and Cargill's request that it be awarded damages pursuant to 49 U.S.C. §11704(b). Cargill responded to BNSF's discovery requests on February 4, 2011. Cargill's Responses and Objections to Defendant's First Set of Discovery Requests is included as Attachment B. Cargill's responses reflect a nearly complete refusal to provide information responsive to BNSF's discovery requests. Cargill refused to provide any answer at all to 12 of 21 interrogatories and flatly refused to produce any documents in response to 13 of 19 document requests.

BNSF and Cargill subsequently had two meet and confer sessions to discuss Cargill's responses to BNSF's discovery requests. At the meet and confer sessions, Cargill indicated that it did not intend to respond to several requests that BNSF identified as relevant to injury and damages because Cargill did not believe that the information sought in those requests was relevant in this proceeding. Cargill further indicated that it was not willing to discuss possible

ways of addressing any burden and overbreadth concerns relating to the injury and damages requests because Cargill objected to producing *any* responsive information on relevance grounds.²

ARGUMENT

The Board's rules permit "discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. §1114.21(a). Discovery is not limited to "the information that [a party] believes is sufficient" to prove its case. *See Seminole Electric Coop., Inc. v. CSX Transport, Inc.*, STB Docket No. 42110, at 2 (STB served Feb. 17, 2009). Instead, a party is generally "entitled to all relevant and potentially admissible information." *Id.*

Under the Board's discovery standards, the Board should allow BNSF to seek information in discovery that could support all of the arguments that BNSF may need to make in this proceeding, including the argument that Cargill suffered no injury from the alleged unreasonable fuel surcharge practice and is entitled to no damages. BNSF does not know what evidence of injury and damages Cargill might present in an effort to comport with the Board's view that an unreasonable practice claim focused on fuel surcharges is premised on a theory of misrepresentation. At the current time, based on the nature of the allegations in Cargill's complaint and its response to one of BNSF's interrogatories, it appears that Cargill may persist in treating this case as a rate reasonableness case by advancing some species of overcharge claim,

² Cargill has agreed to provide unspecified documents in response to some requests, including requests relating to Cargill's allegations of misrepresentation and Cargill's supposed reliance on any misrepresentation. Cargill also agreed to provide documents relating to "analyses" of BNSF's challenged fuel surcharge, but it did not agree to provide documents that "discuss" BNSF's fuel surcharge. Until Cargill produces the documents it has promised, BNSF cannot determine whether Cargill's responses on these issues are adequate. BNSF reserves the right to seek the Board's assistance on these discovery issues if Cargill's production of documents in these areas is inadequate.

and that its case will therefore run afoul of *Union Pacific*. Quite possibly Cargill will advance no alternative theory of injury and damages that fits the framework of a misrepresentation claim. But BNSF certainly has a right to defend itself against whatever claims of injury and damages Cargill does end up advancing. And from the perspective of the uncertain present, that means that BNSF is entitled to any information that would tend to show (1) that Cargill suffered no injury as a result of any misrepresentation regarding BNSF's mileage based fuel surcharge; and (2) that any injury Cargill may have suffered was not manifested in pecuniary damages because any recoverable loss was offset or mitigated.

The standards applicable to injury and damages in an unreasonable practices case involving fuel surcharges have never been addressed by the Board. In cases involving novel issues, the Board does not address the merits of those issues in the context of discovery but allows broad discovery so that the issues can be addressed on the record. *See Entergy*, at 5. Therefore, BNSF should be permitted to conduct broad discovery into whether any alleged misrepresentation had any impact on Cargill and what the nature and magnitude of that impact was. Cargill can make its arguments as to the proper approach to assessing injury and damages when it submits its evidence in this case. It should not be allowed to limit BNSF's presentation of evidence and argument by refusing to provide responses to BNSF's discovery requests on these issues.

I. Cargill Cannot Limit Discovery On The Issues Of Injury And Damages To Information That Cargill Has Unilaterally Decided Is Relevant.

If Cargill is able to show that BNSF's mileage-based fuel surcharge is an unreasonable practice, Cargill will nevertheless have to prove that it suffered an actual injury from the alleged

misrepresentation that is distinct from paying an unreasonably high rate or fuel surcharge.³ BNSF will be entitled to respond to Cargill's proffered evidence on this point with evidence that the alleged misrepresentation had no impact on Cargill and that Cargill suffered no recoverable loss as a result. BNSF should be allowed to develop information through discovery that will enable it to make this showing.

Cargill's initial responses to BNSF's interrogatories indicate that Cargill intends to argue that it was injured because it paid more than it should have under the challenged surcharge. Cargill's response to BNSF's Interrogatory No. 1 states that Cargill

anticipates, at this time, calculating damages as equaling the dollar difference between the fuel surcharges Cargill paid on each shipment subject to a damages claim and the fuel surcharges that would have applied if BNSF had not engaged in the unreasonable practices alleged in Cargill's Complaint, plus applicable interest.

Cargill's apparent theory is that it was injured by an "overcharge" exacted by BNSF—precisely the same approach to injury that one finds in a rate reasonableness case. Cargill therefore refuses to provide discovery on injury and damages because in Cargill's view the only evidence relevant to injury and damages is evidence on the amount of the supposed "overcharge."

However, Cargill has not brought this case as a rate reasonableness case. Cargill can seek damages only to the extent Cargill was affected by any alleged misrepresentation, not because it supposedly paid a fuel surcharge that was too high. The ICC and the courts have recognized that in cases other than rate reasonableness cases, the issue of injury and damages often requires a more wide-ranging factual inquiry into the actual impact of the allegedly

³ Damages do not flow automatically from a violation of the Act. Damages may be recovered only for injuries "sustained by a person as a result of an act or omission of that carrier in violation of this part." 49 U.S.C. § 11704(b). As the Supreme Court long ago held, damages are available only "as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved." *Penn. R.R. Co. v. Int'l Coal Mining Co.*, 230 U.S. 184, 204 (1913).

unlawful practice. See *ICC v. United States ex rel. Campbell*, 289 U.S. 385, 390, 393 (1933) (rejecting the contention that “overcharge” damages are relevant in a rate discrimination case and explaining that injury and damages could be determined only with “full disclosure of the conditions of the business, or of those affecting competition”); see also *Insulating Materials*, 364 I.C.C. 599, 603 (1981), *aff’d*, *Nat’l Insulation Transport. Comm. v. I.C.C.*, 683 F.2d 533 (D.C. Cir. 1982) (rejecting the complainants’ “overcharge” theory as inadequate to establish injury and damages in an unreasonable practice case).

The only thing Cargill has said about injury and damages is the very general “overcharge” statement in response to Interrogatory No. 1. But Cargill has also asserted “its right to reserve judgment on the specific method by [sic] which it will use to establish its claims and establish damages.” Cargill Response to Interrogatory No. 1. Therefore, BNSF’s discovery requests must necessarily anticipate a range of potential injury and damages theories on Cargill’s part.

In addition, because this is a novel case, BNSF should be entitled to pursue broad discovery on injury and damages regardless of the specific injury and damages theory that Cargill ends up presenting. The Board has never previously addressed the nature or scope of injury and damages in a case involving an alleged misrepresentation. It is the Board’s practice in cases involving new issues to allow liberal discovery so that the issues can be addressed based on a full record. For example, in *Entergy* the Board adopted a liberal approach to discovery because the proceeding involved novel issues:

The Board will be liberal in allowing Entergy to obtain the information to make its case under the theories it considers most relevant given that it is the first case of this nature following the Board’s decision in *Review of Rail Access and Competition*. Ultimate issues of relevance, i.e., what Entergy must show to

obtain the relief that it seeks, will be resolved in the final decision on the merits.

Entergy, at 5.

While the Board in *Entergy* focused on the discovery needs of a complainant, a defendant in a case before the Board should have an equal right to pursue information that may be relevant to the defenses it will present in its evidence. Here, the issue of whether the information that BNSF seeks in discovery will turn out to be relevant to those defenses is necessarily uncertain because of the novelty of the issues and because Cargill has refused to set forth its claims of injury and damages with any specificity.⁴ BNSF is entitled to broad discovery in light of this uncertainty.

II. BNSF's Discovery Requests Seek Information On The Extent To Which Cargill Suffered Any Harm From The Alleged Unreasonable Practice.

As explained above, Cargill may recover damages only to the extent it was injured and suffered an actual recoverable loss resulting from a violation of the Act. If Cargill can prove no such injury or loss as a result of the alleged unreasonable practice, Cargill may request an order from the Board that BNSF cease any unreasonable practice but it may not recover any damages.

The specific requests at issue here are set out in the Appendix to this Motion, which describes briefly the relevance of each request to the issue of injury and damages. The discovery on injury and damages that BNSF seeks from Cargill falls into three broad categories.

First, BNSF seeks information on whether the challenged fuel surcharges had any impact on the total amount that Cargill paid for transportation on a given movement. The fuel surcharge is only part of the total amount paid by Cargill for transportation. If Cargill would have paid the

⁴ For example, in response to BNSF's Interrogatories Nos. 20 and 21 Cargill has refused to describe how any alleged misrepresentation injured it or whether it claims to have been injured by something other than a misrepresentation, and it agreed only to produce unspecified documents on these issues.

same total amount for transportation regardless of the alleged misrepresentation relating to the fuel surcharge portion of the total amount, then Cargill has suffered no injury as a result of the alleged violation and it is entitled to no damages. Most of the discovery requests at issue here relate to this issue.

Among other things, the total amount Cargill paid for transportation is affected by the existence of competition. Thus, facts relating to the existence of competitive alternatives to BNSF's transportation service, and how those alternatives affected Cargill's rail transportation costs and purchasing decisions, are relevant to the question whether Cargill suffered any injury as a consequence of the alleged unreasonable practice and the extent of any such injury. For example, if Cargill is complaining about the fuel surcharge it paid to BNSF on movements where Union Pacific Railroad Company was an effective competitive alternative to BNSF's service, then the facts showing why Cargill nevertheless chose to ship on BNSF and pay BNSF's fuel surcharge are relevant to determining whether and to what extent Cargill suffered any injury from the alleged misrepresentation relating to the fuel surcharge portion of the total transportation charge. Other materials regarding Cargill's assessment of the impact of market forces on BNSF's rates and fuel surcharge may confirm BNSF's position that the alleged misrepresentation had no impact on the total amount Cargill paid for transportation.

Second, BNSF seeks information as to whether Cargill structured its commercial arrangements with third parties so as to avoid any impact of increased transportation charges resulting from the payment of BNSF's allegedly unreasonable fuel surcharges. Cargill is an enormous trading company that buys and sells grain and grain products. Cargill may have structured its commercial arrangements so that other parties were responsible for increases in

transportation charges when fuel prices increased.⁵ For example, if another party was responsible for the transportation charges paid by Cargill on particular movements, then there would be no impact on Cargill from the allegedly unreasonable fuel surcharge practice. Similarly, if Cargill structured its buy-sell arrangements so that its profits were unaffected by the amount paid for transportation, then Cargill would have suffered no injury.

Third, BNSF seeks information on measures Cargill may have taken to mitigate any effects of the alleged unreasonable practice by hedging BNSF's mileage based fuel surcharges. The obligation to mitigate damages, long recognized in the common law, clearly applies in cases involving alleged violations of a railroad's duties: "A party suffering loss from a breach of duty must do what a reasonable man would do to mitigate his loss." *Louisiana Railcar, Inc. v. Missouri Pacific R.R. Co.*, 7 I.C.C.2d 30, 1990 ICC LEXIS 304 at *8 (1990). BNSF is therefore entitled to discovery on the question whether Cargill, a sophisticated trader in petroleum markets, was able to mitigate any adverse impact of changes in transportation costs resulting from fuel price increases through hedging arrangements in futures markets.

⁵ Cargill may argue that *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481 (1967) precludes discovery as to whether Cargill "passed on" the impact of BNSF's allegedly unreasonable fuel surcharges practice. In *Hanover Shoe*, the Court, relying in part on older ICC precedent, ruled that a plaintiff challenging a price as unlawfully high due to monopolization by the seller may recover the alleged overcharge as damages even if the plaintiff passed the overcharges on to others downstream. Cargill's argument highlights that it is approaching this unreasonable practice case like a rate reasonableness case since *Hanover Shoe* only applies where a plaintiff seeks damages resulting from the payment of an unlawfully high rate. Because injury and damages flow directly from the payment of an unlawfully high rate in such cases, no other evidence of loss is generally necessary. But the Supreme Court recognized that a "passing on" defense might be relevant if the lawfulness of the rate or price is not at issue: "We also recognize that where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer." *Hanover Shoe*, 392 U.S. at 494. Thus, *Hanover Shoe* cannot be read to preclude a "passing on" defense in a case where damages flow from misrepresentation rather than overcharge.

III. It Would Be Premature To Address Any Burden Issues Cargill Might Raise In Response To BNSF's Motion.

In response to BNSF's motion, Cargill may complain about the burden that would be involved in responding to BNSF's injury and damages discovery requests. But it would be premature to address any objections that Cargill might make about burden. In the parties' meet and confer sessions, BNSF offered to consider any legitimate burden concerns Cargill might have if Cargill dropped its insistence that the requested discovery was irrelevant. But Cargill made clear that there was no reason to discuss burden issues because Cargill did not intend to respond to BNSF's discovery requests on relevance grounds regardless of what accommodations might be reached to deal with the burden of responding to BNSF's requests. Therefore, it would not be appropriate for the Board to address the merits of any burden arguments that Cargill might raise in response to this motion. The parties should be given the opportunity to try to work out any burden issues once the Board has ruled that the discovery BNSF seeks is relevant.

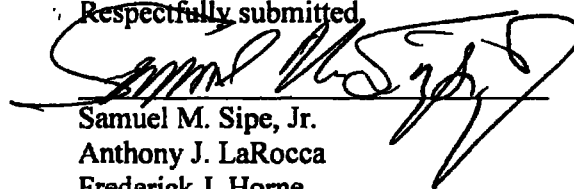
CONCLUSION

For the reasons set forth above, the Board should order Cargill to respond to BNSF's discovery requests on issues relating to injury and damages. Any burden related claims that Cargill may have can be addressed after the Board has made it clear that Cargill cannot avoid its discovery obligations on relevance grounds.

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Certificate of Service

I hereby certify that on this 3rd day of March, 2011, I have served a copy of the foregoing

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APPENDIX TO BNSF'S MOTION TO COMPEL

Relevance Of Individual Requests To Injury/Damages

Interrogatory No. 2: Identify each shipment with respect to which Cargill contends that it incurred damages under the claims asserted in paragraphs 6 and/or 7 of the Complaint. For each such shipment, provide the following information:

- a. waybill number;
- b. shipment date;
- c. origin city and state;
- d. destination city and state;
- e. seven-digit STCC;
- f. shipment tons (net);
- g. number of carloads;
- h. pricing authority or contract under which the shipment moved;
- i. total charges paid for the shipment under the pricing authority or contract, including the fuel surcharge;
- j. the fuel surcharge paid;
- k. the identity of any rail carrier in addition to BNSF that participated in transportation of the shipment;
- l. the consignor of the shipment;
- m. the consignee of the shipment.

Please provide the response to this interrogatory as a computer-readable file in Microsoft Excel or similar format that permits manipulation and sorting of individual records.

Relevance of Information Sought in Interrogatory 2: Cargill has indicated that it intends to seek damages based on the "dollar difference between the fuel surcharges paid *on each shipment subject to the damages claim* and the fuel surcharges that would have applied if BNSF had not engaged in the unreasonable practices alleged in Cargill's complaint, plus applicable interest."

Cargill Response to Interrogatory No. 1 (emphasis added). BNSF is entitled to know which shipments will be included in Cargill's damages claim so that BNSF can investigate whether Cargill suffered any pecuniary loss with respect to each shipment as a result of the alleged unreasonable practice.

Cargill does not object to this Interrogatory on grounds of relevance. Instead, it claims that BNSF knows which movements Cargill is seeking damages for, construes the interrogatory as a document request (in response to which Cargill maintains that it has no documents), and that

the request is premature. None of Cargill's objections warrants Cargill's wholesale refusal to provide any information in response to the interrogatory. BNSF does not know and is entitled to know which shipments Cargill is seeking damages for. The Complaint does not specify which shipments are relevant, stating only that Cargill seeks damages "for all unlawful fuel surcharge payments it has made to BNSF." Complaint at 4-5. As to prematurity, BNSF needs to know now, before evidence is filed, which shipments are at issue so that it can conduct a focused investigation into the market forces and competitive alternatives relating to each shipment and be prepared to rebut any injury and damages evidence that Cargill presents. While a response to this interrogatory clearly will require Cargill to do some work and make some decisions about the scope of its case, Cargill cannot ask for damages and then expect to be relieved of any burden of providing information to BNSF relating to its damages claim that BNSF could use to defend itself against Cargill's claims.

Interrogatory No. 3: For each shipment identified in response to Interrogatory 2:

- a. state whether the shipment could have been transported in whole or in part on a rail carrier other than BNSF and the identity of the carrier or carriers;
- b. state whether the shipment could have been transported in whole or in part by a mode other than rail, the available alternative mode of transportation, and the identity of any carrier or carriers.

Relevance of Information Sought in Interrogatory 3: As BNSF explained in the Motion to Compel, the existence of transportation alternatives is relevant to whether the alleged unreasonable fuel surcharge practice had any impact on Cargill. If Cargill had effective competitive alternatives to BNSF on particular shipments or groups of shipments yet decided to purchase transportation from BNSF, then the facts showing why Cargill chose to ship on BNSF and to pay BNSF's fuel surcharge notwithstanding the availability of a competitive alternative are relevant to determining whether and to what extent Cargill suffered any injury from the alleged unreasonable practice. Cargill is the party in the best position to determine the existence

of effective competitive alternatives for the transportation services it purchases, so it should be required to provide the requested information.

Interrogatory No. 5: For each STCC listed in response to Interrogatory 4:

- a. describe how the commodity is typically transported;
- b. describe whether and why (or why not) transportation by barge or truck is an alternative to transportation by rail;
- c. describe how Cargill decides what mode of transportation to use, including the factors that influence Cargill's decision;
- d. state the percentage of shipments that travel entirely by rail;
- e. state the percentage of shipments that travel entirely by vessel;
- f. state the percentage of shipments that travel entirely by truck;
- g. state the percentage of shipments that travel using multiple modes of transportation (e.g., rail to barge).

Relevance of Information Sought in Interrogatory 5: The interrogatory requests information on transportation alternatives by commodity subject to the fuel surcharge. For the reasons discussed above in connection with Interrogatory No. 3, the existence of transportation alternatives is relevant to whether the alleged unreasonable fuel surcharge practice had any impact on Cargill injury.

Interrogatory No. 8: For each STCC listed in response to Interrogatory 4, identify each employee responsible for:

- a. determining how (e.g., by what mode, by what route) a shipment of that commodity will be made;
- b. analyzing alternative transportation options;
- c. negotiating or arranging for transportation;
- d. approving purchases of transportation;
- e. negotiating the purchase or sale of the commodity;
- f. hedging against fuel surcharges, including changes in fuel surcharges, imposed by transportation providers.

Relevance of Information Sought in Interrogatory 8: The interrogatory asks Cargill to identify employees responsible for making and analyzing transportation arrangements and alternatives, purchasing or selling the commodities shipped, and hedging. The identity of these employees is relevant as they possess knowledge of the injury and damages information sought in other interrogatories (Interrogatories 3, 5, 7, 9, 16).

Interrogatory No. 9: State the name and address of each Cargill facility that was the origin or destination of any shipment identified in response to Interrogatory No. 2. For each such facility:

- a. state whether the facility is directly served by rail;
- b. identify the rail carriers that serve the facility;
- c. state the distance to the nearest rail carriers other than BNSF that could serve the facility;
- d. state whether the facility is directly served by vessel;
- e. state the distance to the nearest vessel terminal that could serve the facility;
- f. state whether the facility is directly served by truck.

Relevance of Information Sought in Interrogatory 9: The interrogatory requests information concerning transportation alternatives available at the Cargill origin and destination facilities for shipments for which Cargill claims damages. Cargill has indicated that it will only provide the name and address of facilities but no information about competitive alternatives available at those facilities. However, as discussed above in connection with Interrogatory No. 3, the existence of transportation alternatives is relevant to the question whether the alleged unreasonable fuel surcharge practice had any impact on Cargill. BNSF acknowledges that if Cargill responds to Interrogatory No. 3, it may not need to provide information in response to subparts a, b, d and e of Interrogatory No. 9.

Interrogatory No.10: For each shipment identified in response to Interrogatory 2, state whether Cargill was directly or indirectly compensated by any other person for any portion of the transportation charges incurred. For each such shipment, specify the amount of any such compensation, describe in detail the mechanism by which the compensation was calculated, and identify any contract or other document that sets forth the terms of such compensation. This interrogatory embraces, but is not limited to, the following types of compensation arrangements: cost-plus arrangements; transportation charges assessed by Cargill to any person; charges identified as relating to transportation assessed by Cargill to any person; separate fuel or other surcharges assessed by Cargill to any person; surcharges assessed by Cargill to any person based on delivery location.

Relevance of Information Sought in Interrogatory 10: The interrogatory requests information concerning the extent to which someone other than Cargill was ultimately responsible for some or all of the transportation charges for particular shipments. If Cargill structured its commercial arrangements so that other parties were responsible for increases in transportation charges when

fuel prices increased, or structured its commercial arrangements so that Cargill's profits on a particular movement were unaffected by the amount of the transportation charge paid to BNSF, then Cargill could not legitimately claim that it suffered any pecuniary loss as a result of the allegedly unreasonable practice.

Interrogatory No. 11: For each shipment identified in response to Interrogatory 2, state whether Cargill was directly or indirectly compensated by any other person for any portion of the BNSF fuel surcharge incurred. For each such shipment, specify the amount of any such compensation, describe in detail the mechanism by which the compensation was calculated, and identify any contract or other document that sets forth the terms of such compensation. This interrogatory embraces, but is not limited to, the following types of compensation arrangements: cost-plus arrangements; transportation charges assessed by Cargill to any person; charges identified as relating to transportation assessed by Cargill to any person; separate fuel or other surcharges assessed by Cargill to any person; surcharges assessed by Cargill to any person based on delivery location.

Relevance of Information Sought in Interrogatory 11: While Interrogatory No. 10 sought information concerning the extent to which someone other than Cargill ultimately was responsible for some or all of the *transportation charge* on particular shipments, Interrogatory No. 11 seeks information on the ultimate responsibility of other persons for the *fuel surcharge* paid by Cargill on particular shipments. If Cargill structured its commercial arrangements so that other parties were responsible for fuel surcharges when fuel prices increased, then Cargill could not legitimately claim that it suffered any pecuniary loss as a result of the allegedly unreasonable practice.

Interrogatory No. 15: State whether Cargill charges a fuel surcharge to any of its customers and identify all documents that set forth the terms and conditions of any such fuel surcharge.

Relevance of Information Sought in Interrogatory 15: The interrogatory seeks information on fuel surcharges that are imposed by Cargill. The information sought is relevant to injury and damages. If Cargill charged a fuel surcharge to any of its customers on movements for which it paid a surcharge to BNSF, then the challenged fuel surcharge practice may have had no impact on Cargill or it may have reduced the impact of any allegedly unreasonable fuel surcharge

practice by BNSF. This request also relates to whether BNSF's fuel surcharge practices were unreasonable. If Cargill used fuel surcharges in its own business operations, the structure and design of that fuel surcharge would be relevant to evaluating Cargill's claim that BNSF's fuel surcharge design was unreasonable.

Interrogatory No. 16: Describe in detail any actions Cargill has taken to hedge against fuel costs, including changes in fuel surcharges, imposed by transportation providers.

Relevance of Information Sought in Interrogatory 16: The interrogatory seeks information concerning Cargill hedging activities with respect to fuel costs. Cargill's fuel hedging activity is relevant to the question whether or to what extent Cargill suffered any pecuniary loss as a result of the alleged unreasonable fuel surcharge practice. Cargill clearly knew how BNSF's fuel surcharges would be calculated and how the amount of future surcharge payments would be affected by anticipated changes in oil prices. Cargill therefore had the ability to avoid the impact of future changes in fuel surcharge amounts through hedging arrangements. BNSF is entitled to know the extent to which Cargill mitigated any impact of the challenged fuel surcharges through its hedging activity.

Document Request No. 1: All documents that discuss or analyze the impact of a fuel surcharge (not limited to the BNSF fuel surcharge) on the total price paid for transportation of any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

Relevance of Information Sought in Document Request 1: The request seeks information on how fuel surcharges affect total transportation prices. As explained in BNSF's Motion to Compel, the fuel surcharge is only part of the total amount paid by Cargill for transportation. If Cargill would have paid the same total amount for transportation regardless of the alleged misrepresentation relating to the fuel surcharge portion of the total amount, then Cargill was no worse off as a result of the alleged violation and it is entitled to no damages. BNSF is entitled to

information relating to Cargill's views on whether the amount of the transportation rate it paid as a fuel surcharge had any impact on the total amount it paid for transportation.

Document Request No. 2: All documents that discuss or analyze the effect of railroad fuel surcharges (not limited to the BNSF fuel surcharge) on Cargill costs, Cargill profits, the volume of Cargill shipments, or the volume and/or price of Cargill sales.

Relevance of Information Sought in Document Request 2: The request seeks information on how fuel surcharges affect Cargill costs, shipments, and sales. If the challenged fuel surcharge practice had no impact on Cargill's costs, profits, shipment volumes or prices, then Cargill would have no basis for claiming that it suffered any pecuniary loss as a result of the challenged fuel surcharge.

Document Request No. 3: All documents that discuss or analyze the factors that determine the level of rail rates for transportation of any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

Relevance of Information Sought in Document Request 3: The request seeks information on factors that affect the level of rail rates. As discussed above, if Cargill would have paid the same total amount for transportation regardless of the alleged misrepresentation relating to the fuel surcharge portion of the total amount, then Cargill was no worse off as a result of the alleged violation and it is entitled to no damages. Cargill's internal assessment of the factors that determine the level of transportation rates would therefore be relevant in determining whether the challenged fuel surcharge practice had any impact on the transportation rate. For example, if Cargill determined that in certain markets, the transportation rates are established through direct or indirect competition with other railroads, trucks or barges, that information would be relevant in determining whether the amount Cargill paid in those markets was affected by the challenged fuel surcharge practice. Similarly, if Cargill believes that other market forces affect the amount that BNSF can charge for transportation, Cargill's internal assessment of those market forces

would be relevant in determining whether BNSF's challenged fuel surcharges had any impact on Cargill or the extent of any such impact.

Document Request No. 4: All documents that discuss or analyze rail, truck, or vessel alternatives to transportation by BNSF for any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

Relevance of Information Sought in Document Request 4: The request seeks information on transportation alternatives. For the reasons discussed above in connection with Interrogatory No. 3, the existence of transportation alternatives is relevant to the question whether the alleged unreasonable fuel surcharge practice had any impact on Cargill injury.

Document Request No. 5: All documents that compare rail transportation rates or rail fuel surcharges to transportation rates or fuel surcharges for alternative modes of transportation with respect to any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

Relevance of Information Sought in Document Request 5: The request seeks comparisons of rail rates and fuel surcharges to rates and fuel surcharges for alternative modes of transportation. The request explores one aspect of the transportation alternatives potentially available to Cargill. For the reasons discussed above in connection with Interrogatory No. 3, the existence of transportation alternatives is relevant to whether the alleged unreasonable fuel surcharge practice had any impact on Cargill injury.

Document Request No. 6: All documents that discuss or analyze fuel surcharges charged by any transportation provider other than BNSF.

Relevance of Information Sought in Document Request 6: The request seeks documents that discuss or analyze fuel surcharges charged by transportation providers other than BNSF. Cargill has sought to limit its response only to comparisons between the BNSF fuel surcharge and mileage based fuel surcharges by other rail carriers. Such a limitation is not reasonable or appropriate. If Cargill has documents discussing the amount charged by other transportation providers for a fuel surcharge, those documents would be relevant to the availability of effective

competitive alternatives to BNSF whether or not the document expressly compares those alternative fuel surcharge amounts to the amount of BNSF's fuel surcharge. Moreover, documents discussing the amount of other transportation providers' fuel surcharges would be relevant to whether BNSF's fuel surcharge was an unreasonable practice whether or not the document expressly compared BNSF's fuel surcharge to that of other transportation providers.

Document Request No. 13: All documents relating to negotiation of transportation rates or fuel surcharges for any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

Relevance of Information Sought in Document Request 13: Information relating to the negotiation of transportation rates or fuel surcharges on the commodities that Cargill ships on BNSF is relevant to injury and damages because such information would reflect Cargill's assessment of market conditions that impact the amount it pays for transportation, including the existence of market alternatives to BNSF. Information about Cargill's negotiation of transportation rates and fuel surcharges with BNSF and other transportation providers will shed light on the question whether Cargill was worse off as a result of the challenged fuel surcharge practice.

Document Request 16: All documents relating to any actions Cargill has taken to hedge against fuel surcharges, including changes in fuel surcharges, imposed by transportation providers.

Relevance of Information Sought in Document Request 16: The request seeks information concerning hedging by Cargill. As explained in connection with Interrogatory No. 16, Cargill's fuel hedging activity is relevant to whether or to what extent Cargill suffered any pecuniary loss as a result of the alleged unreasonable fuel surcharge practice. Cargill clearly knew how BNSF's fuel surcharges would be calculated and how the amount of future surcharge payments would be affected by anticipated changes in oil prices. Cargill therefore had the ability to avoid the impact of future changes in fuel surcharge amounts through hedging arrangements. BNSF is entitled to

know the extent to which Cargill mitigated any impact of the challenged fuel surcharges through its hedging activity.

Document Request No. 17: All forecasts or projections made or commissioned by Cargill relating to U.S. petroleum prices, including diesel fuel and crude oil prices.

Relevance of Information Sought in Document Request 17: This request is relevant to whether Cargill was in a position to mitigate any impact of the challenged fuel surcharges through hedging activity. Since Cargill knew how BNSF's fuel surcharges would be calculated and is heavily engaged in futures trading, Cargill's familiarity with and knowledge about future movement in petroleum prices would have allowed Cargill to mitigate the impact of any unreasonable fuel surcharge practice through hedge transactions. As discussed previously, BNSF is entitled to know the extent to which Cargill mitigated any impact of the challenged fuel surcharges through its hedging activity.

ATTACHMENT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CARGILL, INCORPORATED

Complainant,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42120

DEFENDANT'S FIRST SET OF DISCOVERY REQUESTS

Defendant BNSF Railway Company ("BNSF") hereby request pursuant to 49 C.F.R. §§ 1114.26 and 1114.30 that complainant Cargill, Incorporated ("Cargill") respond to the following document requests and interrogatories (collectively, "requests"), in accordance with the definitions and instructions set forth below, within 21 days of the date of these requests. Responsive documents should be delivered to Anthony J. LaRocca at Steptoe & Johnson, LLP, 1330 Connecticut Ave., N.W., Washington, D.C. 20036.

DEFINITIONS

A. "Complainant" or "Cargill" or "your" or "you" means Cargill, Incorporated, including its officers, directors, agents, employees and representatives, and any predecessor corporation, past or present subsidiary, or affiliated corporation or business entity, and the officers, directors, agents, employees and representatives of any such predecessor, subsidiary, or affiliate.

B. "BNSF" refers to BNSF Railway Company, and includes its predecessors.

C. "Affiliate" means any person who, directly or indirectly, in whole or in part, owns or controls, is owned or controlled by, or is under common ownership or control with complainant.

D. "Complaint" means the complaint filed by Cargill on August 19, 2010, in Docket No. 42120.

E. "Document" includes without limitation all writings of every kind, letters, telegrams, telexes, memoranda, reports, studies, calendar or diary entries, maps, pamphlets, drafts, notes, graphs, charts, tabulations, analyses, statistical or informational accumulations, accounting records of any kind, audio recordings, photographs, film impressions, videotapes, microfilm, microfiche, vu-graphs, computer files, emails, computer disks, computer programs, software, magnetic tapes, or any medium containing computer programs, software, or data, and sound or mechanical reproductions, and all compilations of the foregoing.

F. "Identify," when used with respect to a document, means to: (1) state the nature of the document (*e.g.*, letter, memoranda, etc.); (2) state the author, date, addressees, and title of the document; and (3) provide a brief summary of the contents of the document.

G. "Identify," when used with respect to a natural person, means to state the person's full name, job title, and home or business address.

H. "BNSF fuel surcharge" means the BNSF fuel surcharge identified in paragraph 5 of the Complaint.

I. "Person" means any natural person or any other entity (including without limitation partnerships, associations, cooperatives, proprietorships and corporations).

J. "STCC" means Standard Transportation Commodity Code.

K. "Vessel" includes any form of water transportation including barges, coastal vessels, and lake vessels.

INSTRUCTIONS

A. Unless a different time period is specified, these requests cover the period from January 1, 2005 to the present.

B. If complainant for any reason (including the assertion of privilege), withholds documents or information responsive to any of these requests or interrogatories, it should state the specific factual and legal basis for doing so and produce documents or information for any part of the request or interrogatory which is not alleged to be objectionable or protected.

C. If documents responsive to these requests have been destroyed since the action was initiated, the complainant shall so state.

D. These requests are continuing in character so as to require complainant to supplement in accordance with 49 C.F.R. § 1114.29.

E. These requests seek documents in the possession, custody or control of complainant, including documents of complainant's agents, employees, representatives, and consultants retained by complainant for purposes of this action.

F. Documents are to be produced as they are kept in the ordinary course of business with the name of the file from which they are obtained. Selection of documents from your files and other sources, and the numbering of any documents, should be performed in a manner that ensures that the sources of each document may be determined, if necessary.

G. In these requests, the conjunctive shall include the disjunctive and vice versa, the singular shall include the plural and vice versa, "all" shall include "any" and vice versa, and

"each" shall include "every" and vice versa, all to the end that each request shall be construed to cover the broadest scope of information.

INTERROGATORIES

Interrogatory No. 1: State in detail the method by which Cargill contends that damages for the claims stated in paragraphs 6 and 7 of the Complaint should be calculated.

Interrogatory No. 2: Identify each shipment with respect to which Cargill contends that it incurred damages under the claims asserted in paragraphs 6 and/or 7 of the Complaint. For each such shipment, provide the following information:

- a. waybill number;
- b. shipment date;
- c. origin city and state;
- d. destination city and state;
- e. seven-digit STCC;
- f. shipment tons (net);
- g. number of carloads;
- h. pricing authority or contract under which the shipment moved;
- i. total charges paid for the shipment under the pricing authority or contract,
including the fuel surcharge;
- j. the fuel surcharge paid;
- k. the identity of any rail carrier in addition to BNSF that participated in
transportation of the shipment;
- l. the consignor of the shipment;
- m. the consignee of the shipment.

Please provide the response to this interrogatory as a computer-readable file in Microsoft Excel or similar format that permits manipulation and sorting of individual records.

Interrogatory No. 3: For each shipment identified in response to Interrogatory 2:

- a. state whether the shipment could have been transported in whole or in part on a rail carrier other than BNSF and the identity of the carrier or carriers;
- b. state whether the shipment could have been transported in whole or in part by a mode other than rail, the available alternative mode of transportation, and the identity of any carrier or carriers.

Interrogatory No. 4: List each seven-digit STCC for which Cargill had at least one shipment on BNSF with respect to which Cargill asserts that it incurred damages under the claims asserted in paragraphs 6 and/or 7 of the Complaint.

Interrogatory No. 5: For each STCC listed in response to Interrogatory 4:

- a. describe how the commodity is typically transported;
- b. describe whether and why (or why not) transportation by barge or truck is an alternative to transportation by rail;
- c. describe how Cargill decides what mode of transportation to use, including the factors that influence Cargill's decision;
- d. state the percentage of shipments that travel entirely by rail;
- e. state the percentage of shipments that travel entirely by vessel;
- f. state the percentage of shipments that travel entirely by truck;
- g. state the percentage of shipments that travel using multiple modes of transportation (*e.g.*, rail to barge).

Interrogatory No. 6: For each STCC listed in response to Interrogatory 4, describe the Cargill line or lines of business responsible for shipments of commodities under that code and how shipments of that commodity are used within that line of business (e.g., input for manufacturing, sold to customers).

Interrogatory No. 7: For each STCC listed in response to Interrogatory 4, state whether Cargill is a purchaser of the commodity, a seller of the commodity, or both. For each such STCC, identify:

- a. if Cargill is a purchaser, the top ten suppliers of the commodity to Cargill;
- b. if Cargill is a seller, Cargill's top ten customers for the commodity;
- c. if Cargill is both a purchaser and seller, the top ten suppliers and customers.

Interrogatory No. 8: For each STCC listed in response to Interrogatory 4, identify each employee responsible for:

- a. determining how (e.g., by what mode, by what route) a shipment of that commodity will be made;
- b. analyzing alternative transportation options;
- c. negotiating or arranging for transportation;
- d. approving purchases of transportation;
- e. negotiating the purchase or sale of the commodity;
- f. hedging against fuel surcharges, including changes in fuel surcharges, imposed by transportation providers.

Interrogatory No. 9: State the name and address of each Cargill facility that was the origin or destination of any shipment identified in response to Interrogatory No. 2. For each such facility:

- a. state whether the facility is directly served by rail;
- b. identify the rail carriers that serve the facility;
- c. state the distance to the nearest rail carriers other than BNSF that could serve the facility;
- d. state whether the facility is directly served by vessel;
- e. state the distance to the nearest vessel terminal that could serve the facility;
- f. state whether the facility is directly served by truck.

Interrogatory No. 10: For each shipment identified in response to Interrogatory 2, state whether Cargill was directly or indirectly compensated by any other person for any portion of the transportation charges incurred. For each such shipment, specify the amount of any such compensation, describe in detail the mechanism by which the compensation was calculated, and identify any contract or other document that sets forth the terms of such compensation. This interrogatory embraces, but is not limited to, the following types of compensation arrangements: cost-plus arrangements; transportation charges assessed by Cargill to any person; charges identified as relating to transportation assessed by Cargill to any person; separate fuel or other surcharges assessed by Cargill to any person; surcharges assessed by Cargill to any person based on delivery location.

Interrogatory No. 11: For each shipment identified in response to Interrogatory 2, state whether Cargill was directly or indirectly compensated by any other person for any portion of the BNSF fuel surcharge incurred. For each such shipment, specify the amount of any such compensation, describe in detail the mechanism by which the compensation was calculated, and identify any contract or other document that sets forth the terms of such compensation. This interrogatory embraces, but is not limited to, the following types of compensation arrangements:

cost-plus arrangements; transportation charges assessed by Cargill to any person; charges identified as relating to transportation assessed by Cargill to any person; separate fuel or other surcharges assessed by Cargill to any person; surcharges assessed by Cargill to any person based on delivery location.

Interrogatory No. 12: For each shipment identified in response to Interrogatory 2, state whether Cargill passed on to any customer some or all of the BNSF fuel surcharge and identify any contract or other document that sets forth the terms of such an arrangement.

Interrogatory No. 13: Explain in detail the basis for the allegation in paragraph 6 of the Complaint that "the general formula set forth . . . to calculate fuel surcharges bears no reasonable nexus to, and overstates, the fuel consumption for the BNSF system traffic to which the surcharge is applied."

Interrogatory No. 14: Explain in detail the basis for the allegation in paragraph 7 of the Complaint that "BNSF is using the Assailed Tariff Item to extract substantial profits over and above its incremental fuel cost increases for the BNSF system traffic to which the surcharge is applied."

Interrogatory No. 15: State whether Cargill charges a fuel surcharge to any of its customers and identify all documents that set forth the terms and conditions of any such fuel surcharge.

Interrogatory No. 16: Describe in detail any actions Cargill has taken to hedge against fuel costs, including changes in fuel surcharges, imposed by transportation providers.

Interrogatory No. 17: Describe in detail each misrepresentation that you claim was made by BNSF concerning the BNSF fuel surcharge. State for each such misrepresentation the

date on which you became aware that that representations made by BNSF might be misleading or untrue.

Interrogatory No. 18: Identify each misrepresentation described in response to Interrogatory 1 upon which you relied and state in detail the form of your reliance.

Interrogatory No. 19: Describe in detail all steps taken by you to assess the truth of any representation by BNSF that you have described as a misrepresentation in response to Interrogatory 1.

Interrogatory No. 20: Do you contend that Cargill has been injured by a misrepresentation concerning BNSF's fuel surcharge? If so, identify the misrepresentation and state in detail the nature of the injury and identify and quantify any damages flowing from the injury.

Interrogatory No. 21: Do you contend that Cargill has been injured by BNSF's fuel surcharge in some manner other than by a misrepresentation concerning that fuel surcharge? If so, state in detail the nature of the injury and identify and quantify any damages flowing from the injury.

REQUESTS FOR PRODUCTION OF DOCUMENTS

Document Request No. 1: All documents that discuss or analyze the impact of a fuel surcharge (not limited to the BNSF fuel surcharge) on the total price paid for transportation of any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

Document Request No. 2: All documents that discuss or analyze the effect of railroad fuel surcharges (not limited to the BNSF fuel surcharge) on Cargill costs, Cargill profits, the volume of Cargill shipments, or the volume and/or price of Cargill sales.

Document Request No. 3: All documents that discuss or analyze the factors that determine the level of rail rates for transportation of any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

Document Request No. 4: All documents that discuss or analyze rail, truck, or vessel alternatives to transportation by BNSF for any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

Document Request No. 5: All documents that compare rail transportation rates or rail fuel surcharges to transportation rates or fuel surcharges for alternative modes of transportation with respect to any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

Document Request No. 6: All documents that discuss or analyze fuel surcharges charged by any transportation provider other than BNSF.

Document Request No. 7: All documents that discuss or analyze the BNSF fuel surcharge.

Document Request No. 8: All documents referring or relating to, or constituting, a misrepresentation by BNSF concerning the BNSF fuel surcharge.

Document Request No. 9: All documents that discuss or analyze injury or damages suffered by Cargill with respect to the claims asserted in paragraph 6 or 7 of the Complaint.

Document Request No. 10: All documents that support the allegation in paragraph 6 of the Complaint that “the general formula set forth . . . to calculate fuel surcharges bears no reasonable nexus to, and overstates, the fuel consumption for the BNSF system traffic to which the surcharge is applied.”

Document Request No. 11: All documents that support the allegation in paragraph 7 of the Complaint that “BNSF is using the Assailed Tariff Item to extract substantial profits over and

above its incremental fuel cost increases for the BNSF system traffic to which the surcharge is applied.”

Document Request No. 12: Documents sufficient to show, by individually waybilled shipment, the amount paid by Cargill with respect to the BNSF fuel surcharge.

Document Request No. 13: All documents relating to negotiation of transportation rates or fuel surcharges for any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

Document Request No. 14: All documents that discuss or analyze BNSF’s cost to provide transportation for any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

Document Request No. 15: All documents that discuss or analyze differences between rates charged by BNSF for single-car shipments, multiple car shipments, and/or shuttle train shipments.

Document Request No. 16: All documents relating to any actions Cargill has taken to hedge against fuel surcharges, including changes in fuel surcharges, imposed by transportation providers.

Document Request No. 17: All forecasts or projections made or commissioned by Cargill relating to U.S. petroleum prices, including diesel fuel and crude oil prices.

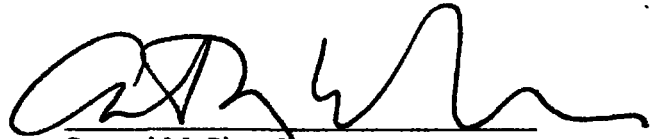
Document Request No. 18: For each line of business described in response to Interrogatory 6, an organization chart sufficient to identify all management level employees.

Document Request No. 19: All documents, regardless of date, identified in response to or relied upon or referenced in your responses to the interrogatories that appear above.

Richard E. Weicher
Jill K. Mulligan
Adam Weiskittel
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

January 14, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Samuel M. Sipe, Jr.', written over a horizontal line.

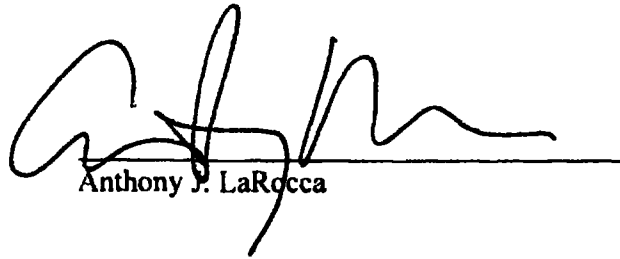
Samuel M. Sipe, Jr.
Anthony J. LaRocca
Frederick J. Horne
STEPTOE & JOHNSON LLP
1330 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 429-3000

ATTORNEYS FOR DEFENDANT

Certificate of Service

I hereby certify that on this 14th day of January, 2011, I have served a copy of the foregoing Defendant's First Set of Discovery Requests on the following by hand delivery:

John H. LeSeur
Peter A. Pfohl
Daniel M. Jaffe
Stephanie M. Adams
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, DC 20036



Anthony J. LaRocca

ATTACHMENT B

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CARGILL, INCORPORATED)	
)	
Complainant,)	
)	
v.)	Docket No. 42120
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	
)	

**CARGILL'S RESPONSES AND OBJECTIONS TO DEFENDANT'S
FIRST SET OF DISCOVERY REQUESTS**

Complainant Cargill, Incorporated ("Cargill"), pursuant to 49 C.F.R. Part 1114, hereby responds to the First Set of Discovery Requests ("Requests") served by BNSF Railway Company ("BNSF") on January 14, 2011.

Cargill is conducting a reasonable, good faith search for non-privileged information and documents responsive to the Requests. Subject to, and without waiving the general and specific objections that follow, and to the extent available, responsive non-privileged information and documents will be produced.

GENERAL RESPONSES AND OBJECTIONS

In addition to the specific objections raised below in response to individual Requests, Cargill objects to BNSF's Definitions, Instructions, Interrogatories, and Requests for Production of Documents as follows:

1. Cargill objects to BNSF's Requests to the extent that they seek documents or information protected by the attorney-client privilege and/or subject to the attorney work-product doctrine. In addition, Cargill objects to BNSF Instruction B on grounds of burden insofar as it requests the assembly and production of a privilege log.

2. Cargill objects to BNSF's Requests to the extent they would impose burdens or obligations on Cargill exceeding those specified in applicable provisions of the Board's Rules of Practice at 49 C.F.R. Part 1114, as interpreted and applied in prior Board rulings, and reserves the right to supplement its objections as necessary.

3. Cargill objects to BNSF's Requests to the extent they request the information in a format not maintained by Cargill in the regular course of business or not readily available in the form requested by BNSF. Where a Request seeks relevant, non-privileged information in a form different from that maintained by Cargill in its ordinary course of business, Cargill will produce any responsive information in the form in which it is maintained by Cargill in the ordinary course of business.

4. Cargill objects to BNSF's Requests as unduly burdensome to the extent that they seek documents or information in BNSF's own possession and are more readily available to BNSF than Cargill, or are readily available from public sources.

5. Cargill objects to BNSF's Definition A (Complainant) to the extent that it may be interpreted to request documents or information from Cargill that is not in the possession, custody, or control of Cargill, including, but not limited to documents or information in the possession, custody, or control of its outside counsel, consultants, affiliates, and directors.

6. Cargill objects to BNSF's Requests seeking Cargill to "identify," "state," "describe," or "explain," and to BNSF's Definition F as unduly burdensome and beyond the scope of permissible discovery to the extent the Requests would impose a burden or obligation on Cargill exceeding those specified in applicable provisions of the Board's Rules of Practice at 49 C.F.R. Part 1114, and specifically, § 1114.26(b), "Option to produce business records."

7. Cargill objects to BNSF's Definition G to the extent that it seeks any information about Cargill employees other than the employee's name and current title.

8. Cargill objects to BNSF's Requests as overbroad to the extent they seek "all" documents that "discuss" or "relate" to a particular subject.

9. Cargill objects on grounds of burden to the 21-day production deadline set forth in BNSF's Requests. Cargill's search for responsive documents and information is ongoing, and such materials (if otherwise not subject to an objection) will be produced as expeditiously as reasonably possible under the circumstances.

10. Consistent with past practice in cases of this nature, Cargill has not secured verifications of the answers to interrogatories herein.

Cargill's following specific objections, answers and responses to BNSF's Requests are subject to, and without waiver of, the foregoing General Objections.

INTERROGATORIES

INTERROGATORY NO. 1: State in detail the method by which Cargill contends that damages for the claims stated in paragraphs 6 and 7 of the Complaint should be calculated.

RESPONSE: Cargill objects to this interrogatory as premature, inconsistent with the Board's schedule for this proceeding, overly broad, and unduly burdensome. *See, e.g.,* Docket No. 42038, *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry. Co.*, STB Docket No. 42038 (STB served May 11, 1999) (denying requests to "preview" complainant's case). Subject to, and without waiving this objection, and without prejudice to its right to reserve judgment on the specific method by which it will use to establish its claims and establish damages, Cargill states that it anticipates, at this time, calculating damages as equaling the dollar difference between the fuel surcharges Cargill paid on each shipment subject to a damages claim and the fuel surcharges that would have applied if BNSF had not engaged in the unreasonable practices alleged in Cargill's Complaint, plus applicable interest.

INTERROGATORY NO. 2: Identify each shipment with respect to which Cargill contends that it incurred damages under the claims asserted in paragraphs 6 and/or 7 of the Complaint. For each such shipment, provide the following information:

- a. waybill number;
- b. shipment date;
- c. origin city and state;
- d. destination city and state;
- e. seven-digit STCC;
- r. shipment tons (net);
- g. number of carloads;
- h. pricing authority or contract under which the shipment moved;
- i. total charges paid for the shipment under the pricing authority or contract, including the fuel surcharge;
- j. the fuel surcharge paid;
- k. the identity of any rail carrier in addition to BNSF that participated in transportation of the shipment;
- l. the consignor of the shipment;
- m. the consignee of the shipment.

Please provide the response to this interrogatory as a computer-readable file in Microsoft Excel or similar format that permits its manipulation and sorting of individual records.

RESPONSE: Cargill objects to this interrogatory for the same reasons it objected to Interrogatory No. 1 and incorporates those objections by reference. In addition, Cargill objects on grounds that (i) this interrogatory is a document production request; (ii) Cargill does not possess documents prepared in the ordinary course of business that contain the information requested in the form requested (*see* General Objection No. 3); and (iii) based on information and belief, BNSF is already in possession of documents containing some or all of the requested information for all Cargill shipments transported by BNSF and that the information is more readily available to BNSF than to Cargill (*see* General Objection No. 4).

INTERROGATORY NO. 3: For each shipment identified in response to Interrogatory 2:

- a. state whether the shipment could have been transported in whole or in part on a rail carrier other than BNSF and the identity of the carrier or carriers;
- b. state whether the shipment could have been transported in whole or in part by a mode other than rail, the available alternative mode of transportation, and the identity of any carrier or carriers.

RESPONSE: Cargill objects to this interrogatory for the same reasons it objects to Interrogatory No. 1 and incorporates those objections by reference. In addition, Cargill objects to this interrogatory on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 4: List each seven-digit STCC for which Cargill had at least one shipment on BNSF with respect to which Cargill asserts that it incurred damages under the claims asserted in paragraphs 6 and/or 7 of the Complaint.

RESPONSE: Cargill objects to this interrogatory for the same reasons it objects to Interrogatory No. 1 and incorporates those objections by reference. Subject to, and

without waiving those objections, and without waiving its right to seek damages on any particular shipment involving any particular commodity based upon further review and discovery in this case, Cargill is compiling responsive information, and will provide BNSF a supplemental response to this interrogatory and/or responsive documents, containing a listing of seven-digit STCC number commodities that it has identified to date, based upon information reasonably available to it to date, of commodities that have moved under the Assailed Tariff Item.

INTERROGATORY NO. 5: For each STCC listed in response to Interrogatory 4:

- a. describe how the commodity is typically transported;
- b. describe whether and why (or why not) transportation by barge or truck is an alternative to transportation by rail;
- c. describe how Cargill decides what mode of transportation to use, including the factors that influence Cargill's decision;
- d. state the percentage of shipments that travel entirely by rail;
- e. state the percentage of shipments that travel entirely by vessel;
- f. state the percentage of shipments that travel entirely by truck;
- g. state the percentage of shipments that travel using multiple modes of transportation (*e.g.* rail to barge).

RESPONSE: Cargill objects to this interrogatory for the same reasons it objects to Interrogatory No. 1 and incorporates those objections by reference. In addition, Cargill objects to this interrogatory on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 6: For each STCC listed in response to Interrogatory 4, describe the Cargill line or lines of business responsible for shipments of commodities under that code and how shipments of that commodity are used within that line of business (*e.g.*, input for manufacturing, sold to customers).

RESPONSE: Cargill objects to this interrogatory for the same reasons it objects to Interrogatory No. 1 and incorporates those objections by reference. In addition, Cargill objects to this interrogatory on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to, and without waiving those objections, and without waiving its right to seek damages on any particular shipment based upon further review and discovery in this case, Cargill is developing responsive information to the extent reasonably available and will provide BNSF a supplemental response to this interrogatory and/or responsive documents, containing the information.

INTERROGATORY NO. 7: For each STCC listed in response to Interrogatory 4, state whether Cargill is a purchaser of the commodity, a seller of the commodity, or both. For each such STCC, identify:

- a. if Cargill is a purchaser, the top ten suppliers of the commodity to Cargill;
- b. if Cargill is a seller, Cargill's top ten customers for the commodity;
- c. if Cargill is both a purchaser and seller, the top ten suppliers and customers.

RESPONSE:

Cargill objects to this interrogatory for the same reasons it objects to Interrogatory No. 1 and incorporates those objections by reference. In addition, Cargill objects to this interrogatory on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 8: For each STCC listed in response to Interrogatory 4, identify each employee responsible for:

- a. determining how (*e.g.*, by what mode, by what route) a shipment of that commodity will be made;
- b. analyzing alternative transportation options;
- c. negotiating or arranging for transportation;

- d. approving purchases of transportation;
- e. negotiating the purchase or sale of the commodity;
- f. hedging against fuel surcharges, including changes in fuel surcharges, imposed by transportation providers.

RESPONSE: Cargill objects to this interrogatory for the same reasons it objects to Interrogatory No. 1 and incorporates those objections by reference. In addition, Cargill objects to this interrogatory on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 9: State the name and address of each Cargill facility that was the origin or destination of any shipment identified in response to Interrogatory No. 2. For each such facility:

- a. state whether the facility is directly served by rail;
- b. identify the rail carriers that serve the facility;
- c. state the distance to the nearest rail carriers other than BNSF that could serve the facility;
- d. state whether the facility is directly served by vessel;
- e. state the distance to the nearest vessel terminal that could serve the facility;
- f. state whether the facility is directly served by truck.

RESPONSE: Cargill objects to this interrogatory for the same reasons it objects to Interrogatory No. 1 and Interrogatory No. 2 and incorporates those objections by reference. In addition, Cargill objects to this interrogatory on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to, and without waiving those objections, and without waiving its right to seek damages on any particular shipment based upon further review and discovery in this case, Cargill is developing, and to the extent reasonably available, will provide BNSF a supplemental response to this interrogatory and/or responsive documents that will include the name and

address of Cargill facilities that were an origin or destination of the commodities identified in response to Interrogatory No. 4.

INTERROGATORY NO. 10: For each shipment identified in response to Interrogatory 2, state whether Cargill was directly or indirectly compensated by any other person for any portion of the transportation charges incurred. For each such shipment specify the amount of any such compensation, describe in detail the mechanism by which the compensation was calculated, and identify any contract or other document that sets forth the terms of such compensation. This interrogatory embraces, but is not limited to, the following types of compensation arrangements: cost-plus arrangements; transportation charges assessed by Cargill to any person; charges identified as relating to transportation assessed by Cargill to any person; separate fuel or other surcharges assessed by Cargill to any person; surcharges assessed by Cargill to any person based on delivery location.

RESPONSE: Cargill objects to this interrogatory for the same reasons it objects to Interrogatory No. 1 and Interrogatory No. 2 and incorporates those objections by reference. In addition, Cargill objects to this interrogatory on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 11: For each shipment identified in response to Interrogatory 2, state whether Cargill was directly or indirectly compensated by any other person for any portion of the BNSF fuel surcharge incurred. For each such shipment, specify the amount of any such compensation, describe in detail the mechanism by which the compensation was calculated, and identify any contract or other document that sets forth the terms of such compensation. This interrogatory embraces, but is not limited to, the following types of compensation arrangements: cost-plus arrangements; transportation charges assessed by Cargill to any person; charges identified as relating to transportation assessed by Cargill to any person; separate fuel or other surcharges assessed by Cargill to any person; surcharges assessed by Cargill to any person based on delivery location.

RESPONSE: Cargill objects to this interrogatory for the same reasons it objects to Interrogatory No. 1 and Interrogatory No. 2 and incorporates those objections by reference. In addition, Cargill objects to this interrogatory on grounds that it is

overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 12: For each shipment identified in response to Interrogatory 2, state whether Cargill passed on to any customer some or all of the BNSF fuel surcharge and identify any contract or other document that sets forth the terms of such an arrangement.

RESPONSE: Cargill objects to this interrogatory for the same reasons it objects to Interrogatory No. 1 and Interrogatory No. 2 and incorporates those objections by reference. In addition, Cargill objects to this interrogatory on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 13: Explain in detail the basis for the allegation in paragraph 6 of the Complaint that "the general formula set forth . . . to calculate fuel surcharges bears no reasonable nexus to, and overstates, the fuel consumption for the BNSF system traffic to which the surcharge is applied."

RESPONSE: Cargill objects to this interrogatory as premature, inconsistent with the Board's schedule for this proceeding, overly broad, and unduly burdensome. *See, e.g.,* Docket No. 42038, *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry. Co.*, STB Docket No. 42038 (STB served May 11, 1999) (denying requests to "preview" complainant's case). Cargill will be submitting its proof in support of the referenced allegations in the evidence it presents in this proceeding, after discovery is completed.

INTERROGATORY NO. 14: Explain in detail the basis for the allegation in paragraph 7 of the Complaint that "BNSF is using the Assailed Tariff Item to extract substantial profits over and above its incremental fuel cost increases for the BNSF system traffic to which the surcharge is applied."

RESPONSE: Cargill objects to this interrogatory as premature, inconsistent with the Board's schedule for this proceeding, overly broad, and unduly burdensome. *See, e.g.,* Docket No. 42038, *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry. Co.*, STB Docket No. 42038 (STB served May 11, 1999) (denying requests to "preview" complainant's case). Cargill will be submitting its proof in support of the referenced allegations in the evidence it tenders in this proceeding, after discovery is completed.

INTERROGATORY NO. 15: State whether Cargill charges a fuel surcharge to any of its customers and identify all documents that set forth the terms and conditions of any such fuel surcharge.

RESPONSE: Cargill objects to this interrogatory on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 16: Describe in detail any actions Cargill has taken to hedge against fuel costs, including changes in fuel surcharges, imposed by transportation providers.

RESPONSE: Cargill objects to this interrogatory on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 17: Describe in detail each misrepresentation that you claim was made by BNSF concerning the BNSF fuel surcharge. State for each such misrepresentation the date on which you became aware that that representations made by BNSF might be misleading or untrue.

RESPONSE: Cargill objects to this interrogatory as calling for a legal conclusion as to what may, or may not, constitute a "misrepresentation" and does not identify who "you" is. Cargill further objects to this interrogatory on grounds that it is overbroad, vague, and

unduly burdensome. Subject to, and without waiving those objections, Cargill will produce responsive non-privileged documents (other than invoices or similar documents) from which the information can be obtained to the extent such documents are reasonably available.

INTERROGATORY NO. 18: Identify each misrepresentation described in response to Interrogatory 1 upon which you relied and state in detail the form of your reliance.

RESPONSE: Cargill assumes the reference to "Interrogatory 1" should be to "Interrogatory 17." Cargill objects to this interrogatory for the same reasons it objects to Interrogatory No. 17 and incorporates those objections and its response by reference.

INTERROGATORY NO. 19: Describe in detail all steps taken by you to assess the truth of any representation by BNSF that you have described as a misrepresentation in response to Interrogatory 1.

RESPONSE: Cargill assumes the reference to "Interrogatory 1" should be to "Interrogatory 17." Cargill objects to this interrogatory for the same reasons it objects to Interrogatory No. 17 and incorporates those objections and its response by reference.

INTERROGATORY NO. 20: Do you contend that Cargill has been injured by a misrepresentation concerning BNSF's fuel surcharge? If so, identify the misrepresentation and state in detail the nature of the injury and identify and quantify any damages flowing from the injury.

RESPONSE: Cargill objects to this interrogatory for the same reasons it objects to Interrogatory Nos. 17-19 and incorporates those objections and responses thereto by reference. Cargill further objects to BNSF's request to "quantify any damages" for the same reasons it objects to Interrogatory No. 1, and it incorporates those objections and that response by reference.

INTERROGATORY NO. 21: Do you contend that Cargill has been injured by BNSF's fuel surcharge in some manner other than by a misrepresentation concerning that fuel surcharge? If so, state in detail the nature of the injury and identify and quantify any damages flowing from the injury.

RESPONSE: Cargill objects to this interrogatory for the same reasons it objects to Interrogatory Nos. 17-20 and incorporates those objections and responses thereto by reference. Cargill further objects to BNSF's request to "quantify any damages" for the same reasons it objects to Interrogatory No. 1, and it incorporates those objections and that response by reference.

REQUESTS FOR PRODUCTION OF DOCUMENTS

DOCUMENT REQUEST NO. 1: All documents that discuss or analyze the impact of a fuel surcharge (not limited to the BNSF fuel surcharge) on the total price paid for transportation of any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

RESPONSE: Cargill objects to this request on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

DOCUMENT REQUEST NO. 2: All documents that discuss or analyze the effect of railroad fuel surcharges (not limited to the BNSF fuel surcharge) on Cargill costs, Cargill profits, total volume of Cargill shipments, or the volume and/or price of Cargill sales.

RESPONSE: Cargill objects to this request on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

DOCUMENT REQUEST NO. 3: All documents that discuss or analyze the factors that determine the level of rail rates for transportation of any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

RESPONSE: Cargill objects to this request on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

DOCUMENT REQUEST NO. 4: All documents that discuss or analyze rail, truck, or vessel alternatives to transportation by BNSF for any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

RESPONSE: Cargill objects to this request on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

DOCUMENT REQUEST NO. 5: All documents that compare rail transportation rates or rail fuel surcharges to transportation rates or fuel surcharges for alternative modes of transportation with respect to any commodity shipped by Cargill that is subject to the BNSF Fuel surcharge.

RESPONSE: Cargill objects to this request on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

DOCUMENT REQUEST NO. 6: All documents that discuss or analyze fuel surcharges charged by any transportation provider other than BNSF.

RESPONSE: Cargill objects to this request on grounds that it is overbroad, vague, unduly burdensome, and seeks in part information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to, and without waiving this objection, Cargill will conduct a reasonable search for responsive analyses that compare any BNSF mileage based fuel surcharge to any mileage based fuel surcharge used or considered by any other rail carrier and will produce any such responsive, non-privileged analyses, if any.

DOCUMENT REQUEST NO. 7: All documents that discuss or analyze the BNSF fuel surcharge.

RESPONSE: Cargill objects to this request on grounds that it is overbroad, vague, unduly burdensome. Subject to, and without waiving this objection, Cargill will conduct a reasonable search for responsive analyses and will produce responsive, non-privileged analyses, if any.

DOCUMENT REQUEST NO. 8: All documents referring or relating to, or constituting, a misrepresentation by BNSF concerning the BNSF fuel surcharge.

RESPONSE: Cargill objects to this request on grounds that it is overbroad, vague, and unduly burdensome. Cargill further objects to this request as calling for a legal conclusion as to what may, or may not, constitute a "misrepresentation." Subject to, and without waiving these objections, Cargill will conduct a reasonable search for responsive documents, and will produce responsive, non-privileged documents (other than invoices or similar documents), if any.

DOCUMENT REQUEST NO. 9: All documents that discuss or analyze injury or damages suffered by Cargill with respect to the claims asserted in paragraph 6 or 7 of the Complaint.

RESPONSE: Cargill objects to this request as premature, inconsistent with the Board's schedule for this proceeding, overly broad, and unduly burdensome. *See, e.g.,* Docket No. 42038, *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry. Co.*, STB Docket No. 42038 (STB served May 11, 1999) (denying requests to "preview" complainant's case). Cargill will be submitting its proof of damages in the evidence it presents in this proceeding, after discovery is completed.

DOCUMENT REQUEST NO. 10: All documents that support the allegation in paragraph 6 of the Complaint that "the general formula set forth . . . to calculate fuel surcharges bears no reasonable nexus to, and overstates, the fuel consumption for the BNSF system traffic to which the surcharge is applied."

RESPONSE: Cargill objects to this request as premature, inconsistent with the Board's schedule for this proceeding, overly broad, and unduly burdensome. *See, e.g.,* Docket No. 42038, *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry. Co.*, STB Docket No. 42038 (STB served May 11, 1999) (denying requests to "preview" complainant's case). Cargill will be submitting its proof in support of the referenced allegation in the evidence it presents in this proceeding, after discovery is completed.

DOCUMENT REQUEST NO. 11: All documents that support the allegation in paragraph 7 of the Complaint that "BNSF is using the Assailed Tariff Item to extract substantial profits over and above its incremental fuel cost increases for the BNSF system traffic to which the surcharge is applied."

RESPONSE: Cargill objects to this request as premature, inconsistent with the Board's schedule for this proceeding, overly broad, and unduly burdensome. *See, e.g.,* Docket No. 42038, *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry. Co.*, STB Docket No. 42038 (STB served May 11, 1999) (denying requests to "preview" complainant's case). Cargill will be submitting its proof in support of the referenced allegation in the evidence it presents in this proceeding, after discovery is completed.

DOCUMENT REQUEST NO. 12: Documents sufficient to show, by individually waybilled shipment, the amount paid by Cargill with respect to the BNSF fuel surcharge.

RESPONSE: Cargill objects to this request on grounds that, based on information and belief, the requested waybill documents are in BNSF's own possession and are more readily available to BNSF than to Cargill. *See* General Objection No. 4.

DOCUMENT REQUEST NO. 13: All documents relating to negotiation of transportation rates or fuel surcharges for any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

RESPONSE: Cargill objects to this request on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

DOCUMENT REQUEST NO. 14: All documents that discuss or analyze BNSF's cost to provide transportation for any commodity shipped by Cargill that is subject to the BNSF fuel surcharge.

RESPONSE: Cargill objects to this request on grounds that it is overbroad, vague, and unduly burdensome. Subject to, and without waiving this objection, Cargill will conduct a reasonable search for responsive cost analyses and will produce responsive, non-privileged cost analyses, if any.

DOCUMENT REQUEST NO. 15: All documents that discuss or analyze differences between rates charged by BNSF for single-car shipments, multiple car shipments, and/or shuttle train shipments.

RESPONSE: Cargill objects to this request on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

DOCUMENT REQUEST NO. 16: All documents relating to any actions Cargill has taken to hedge against fuel surcharges, including changes in fuel surcharges, imposed by transportation providers.

RESPONSE: Cargill objects to this request on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

DOCUMENT REQUEST NO. 17: All forecasts or projections made or commissioned by Cargill relating to U.S. petroleum prices, including diesel fuel and crude oil prices.

RESPONSE: Cargill objects to this request on grounds that it is overbroad, vague, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

DOCUMENT REQUEST NO. 18: For each line of business described in response to Interrogatory 6, an organization chart sufficient to identify all management level employees.


RESPONSE: Cargill will produce responsive documents.

DOCUMENT REQUEST NO. 19: All documents, regardless of date, identified in response to or relied upon or referenced in your responses to the interrogatories that appear above.

RESPONSE: Cargill objects to this request on grounds that it is overbroad, vague, and unduly burdensome. Subject to, and without waiving this objection, Cargill will conduct a reasonable search for responsive documents and will produce responsive, non-privileged documents, if any.

Respectfully submitted,

CARGILL, INCORPORATED

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Dated: February 4, 2011

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify, that I have this 4th day of February, 2011 caused to be served copies of the above discovery responses and objections by electronic mail and by U.S. Mail first class postage prepaid on outside counsel for Defendant BNSF Railway Company, as follows:

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